the counterclaim." The learned Judge based this proposition on the decision of the Court of Appeal in England in *Sheppards & Co.* v. *Wilkinson & Jarvis.*[3] In that case, the Master of the Rolls said:

"There might be either a defence to the Claim which was plausible, or there might be a counterclaim pure and simple. To shut out such a counterclaim if there was any substance in it would be an autocratic and violent use of Order XIV. The Court has no power to try such a counterclaim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."

Lindley L.J. in the same case said, "The counterclaim was by no means frivolous, and the defendants ought not to be shut out from trying it." It is clear that when considering whether the defendant had pleaded a plausible counterclaim the test is whether or not it is reasonably possible for the defendant to succeed if the counterclaim is brought to trial. Secondly, whether the counterclaim is frivolous or not. In my judgment, the defendant has set out a plausible counterclaim in that it is reasonably possible for it to succeed at the trial. Furthermore, the counterclaim is not frivolous.

Mr. Kumar contended that the defendant had failed to establish that it had a plausible counterclaim because the defendant had not filed an affidavit to explain how it had a plausible counterclaim. From the record, I find that the defendant had entered appearance on July 12, 1984. The defence and counterclaim was filed on July 18, 1984. I do not think it is mandatory for the defendant to file any affidavit since the defence and counterclaim had already been filed.

For the reasons stated above, I confirm the order I made in Chambers on November 11, 1984 *i.e.* the plaintiff's appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Siva, Thurai, Mariany & Co.*

BHAGWAN SINGH & CO. SDN. BHD. v. HOCK HIN BROS. SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) June 13, 1986]

[Penang – Originating Motion No. 27 of 1985]

Land Law – Caveat – Application to remove – Priority of equities – National Land Code, 1965, s. 327(1).

Land Law – Easement – Priority of equities – National Land Code, 1965, s. 327(1).

On July 30, 1945, one T.V. Templeton, since deceased, sold a plot of land comprised in lot 64(1A) (now known as Lot 52) M.K. 17, Batu Ferringhi, Penang, to the respondent company, retaining other land adjoining it, being lot 64(1) (now known as lot 39). At the time of the said sale and purchase it was orally agreed between the parties that the purchaser and its successors in title would have a right of way with or without vehicles to pass over the then existing road on lot 39 ("the servient land").

Similarly also on July 30, 1945 the deceased Templeton sold another adjoining plot of land being lot no. 64(13) M.K. 17, Batu Ferringhi (now known as lot 51) to one Choong Eng Hye, a Director of the respondent company. Again as in the case of the sale to the respondent company there was an identical oral agreement whereby the purchaser Choong and his successors-in-title would have a right of way as aforesaid.

Then on July 12, 1971, the Trustees of the Will Trusts of Templeton, deceased, ("the Trustees"), sold five neighbouring plots of land in M.K. 17, Batu Ferringhi, including the servient land to one Low Yow Chuan, the Managing Director of Low Yat Holdings Sdn. Bhd. pursuant to an agreement of sale and purchase dated July 12, 1971. The effect of clause II of this agreement of sale and purchase was that the five plots of land were sold subject to a right of way over the existing road on the servient land thus giving adjoining landowners access from their land to the public highway known as Batu Ferringhi road. By a transfer dated September 29, 1971 the said Low Yow Chuan conveyed the five plots of land to Low Yat Holdings Sdn. Bhd. as his nominee. Ten years later by a letter dated January 7, 1982 the Trustees assigned to the respondent company the benefits of clause II aforesaid, which the latter duly accepted.

By an agreement dated July 30, 1980, Low Yat Holdings agreed to sell and the applicant company agreed to purchase, plot T/20 (now lot 545 – "the applicant company's plot"), comprised in the servient land, with a house to be erected thereon at a price of $275,000.00 and $3,564.00 for additional work. The applicant company had paid a substantial part of the purchase price but was unable to obtain a registrable transfer because of the existence of a private caveat imposed by the respondent company as recently as May 31, 1983 against that part of the servient land to protect its claim to a registrable easement. The applicant company therefore applied under section 327(1) of the National Land Code, 1965 for the removal of the caveat.

The sole question for the determination of the court was the question of the priority of equities.

Held, allowing the applicant company's claim: (1) the prior equity in time, that is, the respondent company's, should prevail against the applicant company's later equity, unless the evidence discloses some act or omission on the part of the respondent company which has or might have had the effect of inducing the applicant company to act to its prejudice;

(2) the agreement for the right of way in question being oral and not by deed was void;

(3) it was open to the respondent company to have obtained from the deceased, Templeton, a deed providing for the right of way, but this, it had omitted to do. This omission on its part constituted negligence;

(4) there is no doubt that had the respondent company obtained an easement by deed under the Conveyancing and Law of Property Ordinance, 1886, or registered an easement under the Code or, at least, registered a caveat prior to July 30, 1980, the applicant company would not have entered into the contract of sale and purchase (bearing in mind that the right of way concerned passes through the applicant company's plot) and so would not have acted to its prejudice;

(5) after taking into consideration the interests of the parties and all relevant discretionary factors, including the balance of convenience, the caveat must be removed.

[*Editorial Note*: The respondent company withdrew the appeal against the judgment of Edgar Joseph Jr. J. (Mahkamah Persekutuan Rayuan Sivil No. 284/1985) and had filed Notice of Withdrawal on August 22, 1986.]

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212, 215.
(2) *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396.
(3) *UMBC Berhad* v. *Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 M.L.J. 87.
(4) *Abigail* v. *Lapin* [1934] A.C. 491.
(5) *Butler* v. *Fairclough* (1917) 23 C.L.R. 78, 91.
(6) *Vallipuram Sivaguru* v. *PCRM Palaniappa Chetty & Anor.* [1937] M.L.J. 59.
(7) *United Malayan Banking Corporation Bhd.* v. *Goh Tuan Laye & Anor.* [1976] 1 M.L.J. 169.
(8) *Yong Tong Hong* v. *Siew Soon Wah* [1971] 2 M.L.J. 105.
(9) *Lin Nyuk Chan* v. *Wong Sz Tsin* [1964] M.L.J. 200.
(10) *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A.C. 491.
(11) *Crabb* v. *Arun District Council* (1976) Ch. Div. 179.
(12) *Chin Cheng Hong* v. *Hameed & Ors.* [1954] M.L.J. 169.
(13) *Haroon bin Guriaman* v. *Nik Mah binte Nik Mat & Anor.* [1951] M.L.J. 209, 211.

ORIGINATING MOTION.

R.J. Manecksha for the applicants.

Gan Teik Chee for the respondents.

Cur. Adv. Vult.

Edgar Joseph Jr. J. : This was an application under s. 327(1) of the National Land Code, 1965, ("the Code") for removal of a caveat.

The applicant, an incorporated company, is not the caveatee and so has no registered title to rely on as *prima facie* evidence of its interest in the land concerned. In the words of Lord Diplock, in the oft quoted case of *Eng Mee Yong & Ors.* v. *Letchumanan*[1]:

"It is for him to begin by satisfying the court that there are sufficient grounds in fact and law to treat him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat."

Now the jurisdiction of this Court in considering applications for removal of a caveat is conferred by section 327(1) of the Code and empowers it "to make such order as it may think just." A caveat being in the nature of a statutory injunction, the principles enunciated in *American Cyanamid* v. *Ethicon Ltd.*[2] – would apply and I have accordingly kept these in the forefront of my mind.

It is now necessary to set out the particular circumstances of this case. They are neither complicated nor in dispute and may be stated thus:

On July 30, 1945 one T.V. Templeton, since deceased, sold a plot of land comprised in Lot 64(1A) (now known as Lot 52) M.K. 17, Batu Ferringhi, Penang, to the respondent company, retaining other land adjoining it, being Lot 64(1) (now known as Lot 39).

At the time of the said sale and purchase, it was orally agreed between the parties that the purchaser and its successors in title would have a right of way with or without vehicles to pass over the then existing road on Lot 39 ("the servient land.")

Similarly, also on July 30, 1945 the deceased, Templeton, sold another adjoining plot of land being Lot No. 64(13) M.K. 17, Batu Ferringhi (now known as Lot 51) to one Choong Eng Hye, a director of the respondent company.

Again, as in the case of the sale to the respondent company, there was an identical oral agreement, whereby the purchaser, Choong, and his successors in title, were to have a right of way as aforesaid.

In 1971, Choong sold Lot 51 to the respondent company. As in the previous two sales, there was

a contemporaneous oral agreement between the parties thereto that the purchaser and its successors in title would have a right of way as aforesaid.

Then, on July 12, 1971, the Trustees of the Will Trusts of Templeton, deceased, ("the Trustees"), sold five neighbouring plots of land in M.K. 17, Batu Ferringhi, including the servient land to one Low Yow Chuan, the Managing Director of Low Yat Holdings Sendirian Berhad, pursuant to an agreement of sale and purchase dated July 12, 1971.

The effect of Clause 11 of this agreement of sale and purchase was that the five plots of land were sold subject to a right of way over the existing road on the servient land thus giving adjoining landowners access from their lands to the public highway known as the Batu Ferringhi Road.

By a transfer dated September 29, 1971, the said Low Yow Chuan conveyed the five plots of land to Low Yat Holdings Sendirian Berhad as his nominee.

Ten years later, by a letter dated January 7, 1982 the Trustees assigned to the respondent company the benefits of Clause 11 aforesaid, which the latter duly accepted.

And, then, by an agreement in writing dated July 30, 1950 Low Yat Holdings entered into a sale and purchase agreement, whereby it agreed to sell and the applicant company agreed to purchase, Plot T/20 (now Lot 545 – "the applicant company's plot"), comprised in the servient land, with a house to be erected thereon at a price of $275,000 and $3,564 for additional work. The applicant company had paid a substantial part of the purchase price but is unable to obtain a registrable transfer because of the existence of a private caveat imposed by the respondent company as recently as May 31, 1953 against part of the servient land to protect its claim to a registrable easement in respect of the carriageway aforesaid, which claim is the subject matter of a civil suit it has instituted against Low Yat Holdings, being, Civil Suit No. 268/83.

The applicant company has alleged, and this has not been disputed, that it is a *bona fide* purchaser for value without notice of any dispute between the respondent company and Low Yat Holdings Sendirian Berhad.

It is against the background of the above facts that the present application arises.

Clearly, the sole question for the determination of this Court is the question of the priority of equities. I do not consider that the case of *UMBC Berhad* v. *Pemungut Hasil Tanah, Kota Tinggi*[3] applies to exclude this question. That case was concerned solely with the question whether the Court had the jurisdiction to grant relief against forfeiture, in accordance with equitable principles, for non-payment of quit rent to the State Authority of Johore. In that context, the Privy Council held that the Courts in Malaysia had no such jurisdiction. Lord Keith of Kinkel, in a concluding observation, said:

> "The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other matters affecting land there and there is no room for the importation of English law in that field except in so far as the Code itself may expressly provide for this."

In the present case, no question arises of relief against forfeiture of land for non-payment of rent and I am accordingly of the opinion that Lord Keith's observations have no application to the issues herein.

I shall now embark upon a consideration of the question of the respective priorities of the parties.

The Code is based on the Torrens system of Australia and therefore Australian cases would naturally be of considerable assistance.

In *Abigail* v. *Lapin*,[4] an appeal from the High Court of Australia to the Privy Council, Lord Wright approved of the following passage in the judgment of Griffith C.J., speaking for the High Court of Australia, in *Butler* v. *Fairclough*,[5]:

> "It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveat which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal; and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice."

In *Vallipuram Sivaguru* v. *PCRM Palaniappa Chetty & Anor.*,[6] the then Court of Appeal in Malaya applied the English equitable principles in determining a question of priorities.

In *United Malayan Banking Corporation Bhd.* v. *Goh Tuan Laye & Anor.*,[7] Suffian L.P., speaking for the Federal Court, applied the same tests. He referred to the dispute under debate in the following terms (at page 171):

"So in deciding this contest between the Bank on the one hand and the interveners (the purchasers) on the other, the Court should decide in favour of the Bank as being first in time, if but only if other things are equal. The Court should act on the above principle in the absence of caveats and registrations. The qualification that other things must be equal is important, for an equitable claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing an equitable claimant later in time to act to his prejudice."

Accordingly, it is with these last three authorities in mind that I turn to consider the particular circumstances of this case.

In my opinion, the prior equity in time, that is, the respondent company's, should prevail against the applicant company's later equity, unless the evidence discloses some act or omission on the part of the respondent company which has or might have had the effect of inducing the applicant company to act to its prejudice.

Now, prior to 1946, and in particular in 1945, the land law applicable in Penang was the Conveyancing and Law of Property Act, 1886, (Cap. 118), section 53(1) of which provided as follows:

"A conveyance of any estate or interest in land other than a lease for a period not exceeding three years at a rack rent shall be void at law unless the same is by deed in the English language."

The agreement for the right of way in question being oral and not by deed was void. However, it might have been treated as an agreement to grant an easement in respect of which specific performance might have been decreed. So, for example, in *Yong Tong Hong* v. *Siew Soon Wah*[8] – a landlord's action for recovery of possession, the instrument concerned was only a purported lease which void lease was treated by the Federal Court as an agreement for a lease for as long as the law allowed and specific performance decreed accordingly. On appeal to the Privy Council, the decision was upheld and for the same reasons: Another case on the same point is the Federal Court decision in *Lin Nyuk Chan* v. *Wong Sz Tsin*.[9]

Despite the misgivings expressed by Professor Haji Salleh Buang as to the *locus standi* of Equity under the Code, in his well-researched and interesting article entitled "Equity and the National Land Code – Penetrating the Dark Clouds" ([1986] 1 M.L.J. CXXV) it seems to me, that it is too late now, to question the proposition that the English doctrine of equitable estoppel applies and, that as a result, equitable rights or interests in land may arise outside the statutory system of registration of title. In other words, the Torrens system does not prevent the Court from doing equity where the rights of third parties have not intervened: *Loke Yew* v. *Port Swettenham Rubber Company*.[10]

If so, then *Crabb* v. *Arun District Council*[11] affords a prime example of how a landowner, though entitled as of strict right to exclude anyone from passing over its land was, nonetheless, and because of an equity raised against it, obliged to acknowledge that Crabb had a right of way, its strict rights being correspondingly qualified. To Scarman L.J. the issue became solely one of equities; from the conduct and relationship of the parties has an equity arisen; what is its extent; and what is the relief appropriate to satisfy it (*ibid* at page 193).

This being my understanding of the legal position of the oral agreement to grant an easement, it was open to the respondent company to have obtained from the deceased, Templeton, a deed providing for the right of way, but this, it had omitted to do. In my view, this omission on its part constituted negligence.

Then again, on the coming into force of the Code in Penang, the respondent company had another opportunity of creating an easement by registration in the prescribed form as required under section 286(1) but did not avail itself of it. I note that section 284 expressly states that 'no right in the nature of an easement shall be capable of being acquired by prescription (that is to say, by any presumption of a grant from long and uninterrupted user) and "that no such right shall be capable of being acquired by implied grant" except in the case of "ancillary rights" for the enjoyment of an easement which are to be implied in the grant of an easement: (section 286(3)).

Furthermore, I have already noted that the respondent company registered its caveat only as recently as May 31, 1983 when it could easily have done so many years before that – certainly well before the applicant company executed the sale and purchase agreement dated July 30, 1980.

The question which arises is whether these omissions are sufficient to postpone the respon-

dent company's prior equity to the applicant company's subsequent equity. There is no doubt that had the respondent company obtained an easement by deed under the Conveyancing and Law of Property Ordinance, 1886, or registered an easement under the Code or, at least, registered a caveat prior to July 30, 1980 the applicant company would not have entered into the contract of sale and purchase (bearing in mind that the right of way concerned passes through the applicant company's plot) and so would not have acted to its prejudice (see the concluding words of Lord Wright in *Abigail* v. *Lapin* quoted above).

On the other hand, it is true that the applicant company did not register a caveat in respect of its interest as purchaser under the sale and purchaser agreement although in law this would appear to have been possible (see *Chin Cheng Hong* v. *Hameed & Ors.*[12]).

In my view, however, this omission was irrelevant for it could not possibly have caused the respondent company to act to its prejudice. Indeed, there was not, and could not, even have been an allegation to this effect since the rights which accrued to the applicant company were subsequent in point of time to those of the respondent company.

There is a remaining point which needs to be made. According to the affidavit evidence of Tan Keat Hooi, a civil engineer in the employ of Low Yat Holdings Sendirian Berhad, the Caveatee in these proceedings, earthworks on the Mount Pleasure Project on the servient land within which was comprised the applicant company's plot, commenced in March 1979 and were completed about April 1980. The project included the construction of a number of town houses, including the one on the applicant company's plot, which were completed in December 1982. In these circumstances, when the respondent company imposed its caveat on May 31, 1983 it must have had prior knowledge of the applicant company's contending equity. That being so, I would, with respect, echo and adopt the following passage in the judgment of Briggs, J. in *Haroon bin Guriaman* v. *Nik Mah binte Nik Mat & Anor.*[13].

"I think the correct method of approach as regards that is to say that while the failure to impose a caveat may be negligence and, in this respect, both parties were originally equally guilty, the imposition of a caveat when the person imposing it has already knowledge of the contending equity will not necessarily improve his position."

In the result, after taking into consideration the interests of the parties and all relevant discretionary factors, including the balance of convenience, I make an order for removal of the caveat in terms of the summons. The applicant must also have the costs of these proceedings.

Order accordingly.

Solicitors: *Lim Kean Siew & Co.; Gan Teik Chee & Ho.*

HASSAN BIN MOHAMAD & ANOR. v. TEOH KIM SENG

[O.C.J. (Lim Beng Choon J.) July 7, 1986]

[Alor Setar – Kedah Civil Suit No. 151 of 1983]

Damages – Fatal accident – Assessment of damages – Civil Law Act, 1956, ss. 7 & 8.

Tort – Negligence – Liability admitted – Damages.

In this case the plaintiffs sought to recover damages for the death of their son, Mohammed Nazri, a boy of 12 years of age who was killed in a road accident on November 28, 1981. The cause of the accident was the negligent driving of a motor lorry by the defendant. Liability was admitted. The plaintiffs claimed for loss of benefits under section 7 of the Civil Law Act, 1956 ("the Act") and also under section 8 of the Act as administrator and co-administratrix of the estate of the deceased.

Held: (1) although the deceased helped his father in the running of the father's business the so-called services rendered by the deceased to both plaintiffs were not reducible to money value. The plaintiffs also failed to prove that they had a reasonable expectation of pecuniary benefit if the deceased had lived. Therefore, the claims under section 7 of the Act failed;

(2) the award for loss of expectation of life is $4,000;

(3) the award for loss of earnings during the lost years under section 8(2) (c) is $14,954.65.

Cases referred to:

(1) *Blake* v. *Midland Ry* (1852) 18 Q.B. 93; 118 E.R. 35.
(2) *Taff Vale Ry* v. *Jenkins* [1913] A.C. 1, 4.
(3) *Davies* v. *Powell Duffryn Collieries* [1942] A.C. 601, 617.
(4) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.
(5) *Barnett* v. *Cohen* [1921] 2 K.B. 461.
(6) *Thangavelu* v. *Chia Kok Bin* [1981] 2 M.L.J. 277.
(7) *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136.
(8) *Gammell* v. *Wilson* [1981] 1 All E.R. 578.